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U.S. MAGISTRATE JUDGE
DISTRICT OF NEVADA
BY _____ DEPUTY

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Admitted Pro Hac Vice in related Federal Case No. 3:06-cv-0056-BFS-VPC

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

In the Matter of the Search of:

12720 Buckhorn Lane, Reno, NV

and

888 Mastro Drive, Reno, NV, Storage Unit
Numbers 136, 140, 141, 142, and 143

) CASE NO.: 3:06-MJ-0023-VPC

)
) DENNIS AND BRENDA MONTGOMERY'S
) AND THE MONTGOMERY FAMILY TRUST'S EX
) PARTE MOTION FOR DECISION OF THEIR
) MOTIONS FOR UNSEALING SEARCH
) WARRANT MATERIALS, RETURN OF
) PROPERTY PURSUANT TO RULE 41(G) AND
) FOR SEALING AND SEGREGATION OF
) PRIVILEGED MATERIALS ON THE PAPERS
) WITHOUT HEARING.

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1 Dennis Montgomery, his wife, Brenda Montgomery and the Montgomery Family Trust
2 (collectively, the "Montgomerys") hereby request that this Court decide the currently pending
3 motions, which from the Montgomerys' view, has been fully briefed by the parties, on the papers
4 filed and without an evidentiary hearing.
5

6 INTRODUCTION

7 As this Court is well aware, numerous important and valuable items were seized by the
8 Government on March 1 and March 3. In addition to documents, the Government seized Mr.
9 Montgomery's laptop computer and other computer equipment in his house, as well as computer
10 storage media both there and in a storage unit. These are the "tools of Mr. Montgomery's trade" and
11 he needs them to begin working. Moreover, the computers seized contained both attorney-client
12 and trade secret material to which the Government is not entitled *and* which is necessary for Mr.
13 Montgomery's copyright infringement action pending in this Court.
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15 As fully analyzed in the Montgomerys' briefs, although the Montgomerys believe that the
16 search warrant was not supported by probable cause, in light of the fact that the search warrant is
17 facially overbroad and fails to even mention what alleged criminal activity was being investigated,
18 the wholesale seizure of documents and equipment, especially containing attorney-client privileged
19 material, cannot stand. After the Montgomerys filed a motion to unseal the search warrant affidavit,
20 for the return of their property and for the sealing and segregation of their attorney-client and trade
21 secret information, the Government filed its "oppositions." As discussed in the Montgomerys' Reply
22 Memorandum, the Government failed to substantively respond to any of the core issues and that
23 there was no need for an evidentiary hearing since the Government had failed to create any factual
24 issue. Accordingly, this Court permitted supplemental briefing on the issues that the Government
25 failed to address.
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1 Suddenly, according to the Government, a contention was made by, apparently, someone
2 other than the U.S. Attorney's Office that there was allegedly "classified information" in the
3 memoranda already filed under seal with this Court. However, according to the Government, the
4 allegedly "classified" information is the mention of a Government agency being connected to this
5 case. The fact that there was allegedly some type of classified information in the court files was
6 apparently communicated to the Court *ex parte*, which precipitated first a continuance of the
7 supplemental briefing schedule and then a minute order vacating the evidentiary hearing.
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9 As set forth below, not only is the assertion that such information is "classified" frivolous, but
10 this new-found assertion is simply a ruse to delay the proceedings and continue to provide the
11 Government with time to rummage through the seized materials at their leisure. In fact, so little did
12 the Government think of this alleged information that it did not even file a motion for a protective
13 order. The result of this new tactic is procedural limbo for the Montgomerys, who are being
14 deprived of due process. Accordingly, rather than let the Government simply continue to hold the
15 improperly seized materials, the Montgomerys hereby request that this Court decide their Motion on
16 the papers submitted.
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19 ARGUMENT

20 I.

21 THERE IS NO BONA FIDE CLASSIFIED MATERIAL IN THE COURT RECORD AND THE CLAIM IS

22 SIMPLY A RUSE

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24 The Government contends that the Montgomerys' papers filed in this sealed proceeding
25 contain some sort of classified information, that it apparently did not realize from March 10, 2006
26 through April 26, 2006. First, not only is there no classified material among the seized material, but
27 there is zero classified material contained in any of the Montgomerys' papers filed in this action and
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1 they challenge the Government to identify it.¹

2 Second, what constitutes "classified" material is not determined by the whim of the U.S.
3 Attorney or even the Government. Instead, there are very clear and straightforward procedures in
4 place under the National Industrial Security Operating Manual for the designation of classified
5 information, including a procedure for challenging a designation by the contractor. The National
6 Industrial Security Program Operating Manual, DoD 5220.22-M (February 26, 2006 revision), clearly
7 defines "classified" information and how to identify what is classified.² Moreover, the material must
8 be logged by type, classification, date and description by the Government, so that it can easily be
9 tracked.
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12 Pursuant to that manual, all classified material, in order to be "classified," must be clearly
13 marked in very specific ways. The Manual governs the handling of classified information by
14 Government contractors. See Manual, §1-100. Section 4-100 clearly defines the only types of
15 classification, i.e., "confidential," "secret," and "top secret." Classification decisions can only be
16 made by a Government official who has been delegated that authority in writing. Manual, §4-101.
17 The classifier must state on the front of the document (1) the reason for the particular classification
18 and (2) the duration of the classification. *Id.* This is particularly important because it not only
19 governs the handling of the classified information itself, but also, guides the contractor in the event
20 that there is a derivative use of the classified information. Manual, § 4-102.
21

22
23 The only way to determine whether a file is actually classified is to see if it contains the
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25 ¹ Moreover, this is obviously not the first time that classified information is supposedly part of
26 a case, criminal or civil. In fact, in *In re Loral Corporation*, 558 F.2d 1130 (2nd Cir. 1977), the
27 Second Circuit specifically discussed the propriety of a magistrate handling classified information in
28 a civil case.

29 ² A searchable, HTML-based copy of the current National Industrial Security Operating
Manual can be found at <http://www.dtic.mil/whs/directives/corres/rtf/p522022m2x.rtf>.

1 markings that are described in the Manual, § 4-200 (“it is essential that all classified material and
2 information be marked to clearly convey to the holder the level of classification assigned, the
3 [portions that contain or reveal classified information, the period of time any protection is required,
4 and any other notations required for the protection of the information.”) Section 4-201 requires that
5 the security markings set forth in §§ 4-202 through 4-208 are “required for all classified information
6 regardless of the form in which it appears.” Sections 4-202 through 208 set forth the manner in
7 which all information must be marked. Section 4-203 sets forth the overall marking requirements for
8 all types of information. The overall marking must be stamped on the top and bottom of the front, the
9 title page and the first page of the file, etched or marked with stickers. If a container cannot be
10 affixed with a sticker, a written notification of the marking must be furnished to the recipient. This
11 marking requirement even applies to microfilm and email, for example. As verification of the
12 existence of classified information created by a contractor, § 5-203 requires that the Government
13 keep a report of all classified information generated by the contractor. Thus, as the Court can
14 surmise from the above discussion, it is very simple when examining a document or electronic file
15 whether it is classified or not. If it is not marked, it is not classified. If it was not listed by the
16 Government as classified at the time (and not retroactively), it is not classified.

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20 Moreover, what is classified is not a mystery, either. The lack of specificity in the search
21 warrant is particularly egregious in this case given that the Government could easily have identified
22 what it was searching for with exacting specificity, given that the Government by law maintains a list
23 of the classified information given to a contractor, generated by the contractor and retained by the
24 contractor. See e.g., Manual, § 5-201, requiring a “continuous receipt system both within and
25 outside the facility”; § 5-202, requiring the return of a receipt to the Government for any classified
26 information provided to the contractor; § 5-203, requiring that a record of information produced by
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1 the contractor be provided to the Government.

2 Thus, if classified information was truly what the Government was after, and the
3 Montgomerys still do not know for sure, it could have specified the exact document, its marking, the
4 date, time, classification, and media on which it was stored, but did not. That alone speaks volumes
5 about the unconstitutionality of the search. As discussed in the Montgomerys' Memorandum – and
6 completely ignored by the Government – in determining whether a search warrant lacks
7 particularity, the Ninth Circuit examines "whether the government was able to describe the items
8 more particularly in light of the information available to it at the time the warrant was issued. . . .",
9 *United States v. Stubbs*, 873 F.2d 210, 211 (9th Cir. 1989). "Generic classifications in a warrant are
10 acceptable **only** when a more precise description is not possible." *United States v. Kow*, 58 F.3d
11 423, 427 (9th Cir. 1995) (emphasis added). See *United States v. Carey*, 172 F.3d 1268 (11th Cir.
12 1999) (warrant authorizing seizure of computer without identifying criminal conduct invalid). Given
13 the fact that the Government knowingly elected to use broad classifications of documents that
14 essentially authorized the Government, among other things, to seize anything remotely connected to
15 the use of a computer, coupled with the fact that there is no mention of any criminal activity in the
16 search warrant whatsoever, the Court can only conclude that the search warrant is overbroad and
17 unconstitutional. *U.S. v. Hunter*, 13 F. Supp. 2d 574 (D. Vt. 1998) (A search warrant, which called
18 for the seizure of "all computers . . . computer storage devices . . . and all computer software
19 systems," was a catchall warrant, lacking sufficient limitation, so the warrant was overbroad and
20 failed to comply with the 4th Amendment); *Arkansas Chronicle v. Easley*, 321 F.Supp. 2d 776 (E.D.
21 VA 2004) (Search warrant for journalist's home, sought in order to obtain video and three still
22 photos of terrorist bombing previously viewed on laptop, was overbroad and thus violated 4th
23 Amendment particularity requirement).

1 Since a determination of whether the search warrant is overbroad and lacks specificity can be
2 decided on the face of the search warrant, there is literally no chance that such a review of the
3 warrant could implicate some alleged "classified" information.
4

5 II.

6 **THE MONTGOMERYS ARE ENTITLED TO KNOW THE FULL EXTENT OF ANY EX PARTE**
7 **COMMUNICATIONS WITH THE COURT**

8 On April 19, 2006, this Court ordered supplemental briefing on four issues. On April 26,
9 2006, this Court indicated that as a result of an *ex parte* communication from the U.S. Attorney's
10 office, a continuance of the briefing schedule was granted to April 28. On April 28, the Government
11 already served the Montgomerys with its response to Question 4 posed by the Court, and indicated
12 by telephone that a redacted version of the two West affidavits would be provided to the
13 Montgomerys, when this Court issued a new minute order vacating the supplemental briefing and
14 vacating the evidentiary hearing. Thus, the Montgomerys, who are obviously parties to a pending
15 action in this Court, are completely in the dark as to what transpired in connection with this case,
16 with no ability to respond to whatever the Government communicated to the Court and whatever
17 precipitated the Court's action on April 28. See e.g., *Clark v. City of Hermosa Beach* (1996) 48
18 Cal.App.4th 1152, 1172 (right to fair hearing requires opportunity to present rebuttal, finding that *in*
19 camera evidence violated right to fair hearing).
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23 As stated in *United States v. Carmichael*, 232 F.3d 510 (6th Cir. 2000),

24 As a general rule of thumb, in all but the most exceptional circumstances, *ex parte*
25 communications with the court are an extraordinarily bad idea. This court has not
26 concealed its strong disapproval of *ex parte* approaches in criminal cases, reasoning
27 that giving the government private access to the ear of the court is not only "a gross
28 breach of the appearance of justice," but also a "dangerous procedure."

Id. citing *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992) (citation omitted); see also

1 *United States v. Farley*, 746 F.2d 412, 416 (8th Cir. 1984) (suggesting that ex parte communications
2 should be strongly discouraged "regardless of the propriety of the court's motives," because allowing
3 ex parte approaches undermines confidence in the court's impartiality).

4
5 Ex parte approaches "can only be justified and allowed by compelling state interests."
6 *Carmichael*, 232 F.3d at 518. "Suffice it to say that the government bears the burden of
7 demonstrating that the defendant was not prejudiced by an ex parte communication, and its burden
8 is "a heavy one." *Id.* Since the Government presumably contended that there was some allegedly
9 classified information in the court record that precipitated the Court's action, the Montgomerys and
10 their counsel are already aware of the allegedly classified information since it was included in their
11 brief. Accordingly, it is impossible for the Government to establish any compelling state interest to
12 justify the ex parte communication and all Government contacts with the court should be disclosed.
13

14 Instead of an ex parte communication that could not be addressed by the Montgomerys, the
15 Government could at least have followed the procedures set forth in the Classified Information
16 Procedures Act, 18 U.S.C. Appendix III ("CIPA"). Although CIPA only applies to criminal cases "after
17 filing an indictment or information," and there is no criminal case pending, CIPA is a procedural
18 statute; it neither adds to nor detracts from the substantive rights of the defendant. See, e.g., *United*
19 *States v. Anderson*, 872 F.2d 1508, 1514 (11th Cir.), cert. denied, 493 U.S. 1004 (1989); Department
20 of Justice Criminal Resource Manual, §2054. Thus, the procedures set forth in CIPA could have been
21 used by the Government for guidance in how to handle classified information, even in the absence
22 of a criminal case.
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25 III.

26 WITHOUT A DECISION ON THE MONTGOMERYS' MOTION, THEY SUFFER SERIOUS

27 PREJUDICE

1 As discussed in their Reply Memorandum, the Government has improperly seized the tools of
2 Mr. Montgomery's livelihood (the computers), which not only are used by him for his business, but
3 contain the many personal files that all home computers contain – one of the reasons for specificity
4 in a computer search warrant. In addition, the Government continues to have possession of Mr.
5 Montgomery's trade secrets, his attorney-client communications, as well as old electronic media that
6 is necessary for his copyright claims. Without a decision by this Court, the Montgomerys are literally
7 left without a remedy, since the Government continues to maintain and have access to the
8 Montgomerys' property and there is no court order in place regarding the handling and/or return of
9 that property. In *Black v. United States*, 172 F.R.D. 511 (S.D.Fla. 1997), Government contended that
10 the defendants did not suffer irreparable harm and had as a remedy a Rule 41(g) motion after trial.

11 As the court stated:

12 To simply say "let the Plaintiffs raise these issues under Rule 41(e), when the issue
13 presents itself down the road a piece", would have no meaning if the Government
14 were able to review the materials in the meantime. In plain words, when the cat's out
15 of the bag, there is no further need for finite legal determinations of who is entitled to
16 what.

17 *Id.* at 515. In this case, the Montgomerys have a constitutional, Fourth Amendment right to
18 challenge the constitutionality of a search of their home by the Government. They have a right to
19 enforce the Fourth Amendment requirement that the search warrant be specific, and supported by
20 probable cause. With neither a decision on their pending motion – even if decided on the papers –
21 or a pending criminal charge, the Montgomerys literally are deprived of procedural and substantive
22 due process and are prejudiced by each day that the Government unconstitutionally retains their
23 property.

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IV.

**AT THE VERY LEAST, THE COURT SHOULD ORDER THAT THE GOVERNMENT DISCLOSE ANY
REVIEW OF THE SEIZED MATERIALS, AND ISSUE AN ORDER REGARDING THE HANDLING OF
ATTORNEY-CLIENT AND TRADE SECRET MATERIALS**

The Montgomerys are very concerned that the Government continues to have unfettered access to computer files and documents containing attorney-client communications and trade secrets. Moreover, there is no time limit imposed on how long the Government can keep their property. Therefore, the Montgomerys request that the Government be ordered to specifically disclose the date, time and people that have accessed the files, in order to determine whether the Government has already accessed privileged and confidential material. In addition, the Montgomerys request that this Court establish a protocol for handling this property in order to facilitate its return to the Montgomerys.

(A) Handling Classified information.

There is no "classified material" among any materials seized by the Government pursuant to its unconstitutional search. Since, as discussed above, all classified information must be marked, it is very simple when examining a document or electronic file whether it is classified or not. If it is not marked, it is not classified. If it was not listed by the Government as classified at the time (and not retroactively), it is not classified. As a practical matter, therefore, any hard copies of documents will either be marked or they will not. If not, they are not classified. Similarly, a simple search of all electronic files seized from the Montgomerys can be made for the "magic" words, "confidential," "secret," or "top secret." Any files that are found as containing the "magic words" can then be reviewed first for the date of creation of the file. If it was created prior to the first contact with the Government in approximately December 2003, it is clearly not classified in any way. If it was

1 created during the appropriate time, it must be reviewed for a determination of whether it was
2 created by Mr. Montgomery for the purpose of obtaining legal advice. This would often be shown
3 merely by the name of the file. Mr. Montgomery will no doubt be able to look at the title of the file
4 and be able to state whether he thinks it is an attorney-client communication. If the file is listed in
5 the search and is not listed as potentially privileged, no further inquiry need be made. For those
6 documents that contain the search terms and are identified as potentially privileged by Mr.
7 Montgomery, a special master having the appropriate security clearance (or this Court) can review
8 the document in order to determine whether it is indeed privileged. This method will then segregate
9 those files that are potentially classified and which are potentially privileged..
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11
12 (B) Handling of Potentially Privileged Material.

13 Once the potentially classified information is identified (if any), there is no reason for Mr.
14 Montgomery and his counsel *not* to have supervised access to all other documents and files, whether
15 in "hard copy" or electronic, in order to prepare a privilege log of those documents that must be
16 segregated and sealed by this Court, and ordered returned to the Montgomerys. If there is a dispute
17 over whether a particular unclassified file is properly privileged, this Court can rule on the assertion
18 of privilege as it does countless times in litigation. In the alternative, the Montgomerys suggest a
19 procedure similar to that adopted in *Black v. United States*, 172 F.R.D. 511 (S.D.Fla 1997).
20

21 In *Black*, the Court ordered that a printout be prepared that listed each of the files on the
22 computers. The preparation of the list would be supervised by a representative of the Government
23 and the defendants. The list would be reviewed by the Court to determine issues of privilege. The
24 remainder of the files would be sealed and the Government enjoined from reviewing them pending
25 further order of the Court. Unlike in *Black*, where it was conceded that some of the material
26 contained on the computers and disks were properly in the hands of the Government, there is no
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1 such concession here. There is no classified information whatsoever, and the Government has no
2 entitlement to any of the seized materials. Thus, unlike in *Black*, the Montgomerys or their attorneys
3 should have the opportunity to review the list of files to assert privileges. Moreover, in *Black*, the
4 amount of material seized was voluminous. In this case, even the Government concedes that at
5 most there is a "very small amount" of classified material at issue. Therefore, the Court's task is
6 greatly simplified by having the parties attempt to agree in advance of the Court's review, as to what
7 is and is not at issue.
8

9
10 (C) Handling Of Trade Secret Information.

11 The software programs developed by Mr. Montgomery are extremely valuable to the
12 Government. The Government has even promised in writing not to attempt to obtain Mr.
13 Montgomery's technology *by any means*. The Montgomerys are very concerned that the
14 Government is merely using this bogus and unconstitutional search warrant in an effort to obtain the
15 technology from Mr. Montgomery that it believed was stored on computer equipment at his house or
16 in his storage areas in order not to pay Mr. Montgomery for it. The clearest evidence of this is the
17 language of the search warrant itself, which does not even mention "classified information" but
18 focuses instead on the mysterious "Source Code," potential investors who might have copies of Mr.
19 Montgomery's technology, and the wholesale seizure of any computer equipment, storage media or
20 hard drives that the FBI could come across.
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23 The harm to the Montgomerys if this technology falls into the Government's hands is truly
24 irreparable. The Government will have discovered Mr. Montgomery's trade secret mathematical
25 algorithms used to provide the results that only he has so far been able to provide, eliminate any
26 need for the Government to license the technology from the Montgomerys, and worse, the
27 Montgomerys will never even be able to know about it because the Government will classify the
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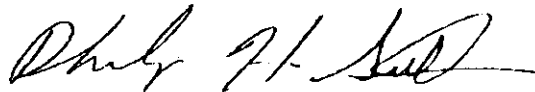
1 information at such a level that it will be impossible for the Montgomerys to even learn that the
2 Government is using the technology, not to mention prove it. Since the Government has absolutely
3 no claim to such information, which was created by Mr. Montgomery prior to any Government
4 involvement and which has valuable commercial applications as well, the Montgomerys are
5 absolutely entitled to prevent that information from falling into the hands of the Government. The
6 Montgomerys should be specifically permitted to access the computer files and prevent the
7 Government from accessing them. Thus, it is a simple matter for the parties, in conjunction with the
8 Government, to review the totality of the files – especially those on the seized computers, and
9 determine whether or not the particular item apparently falls within any recognized security
10 classification, the attorney-client or work product privileges or is a trade secret. The parties would be
11 bound by a protective order fashioned for the handling of the seized materials, in the event that the
12 Court does not order the wholesale return of the material because of the facial invalidity of the
13 search warrant.

14 CONCLUSION

15 For the foregoing reasons, the Montgomerys respectfully request that this Court make the
16 following orders: (1) fully disclose the nature and content of any *ex parte* communications with the
17 Government, (2) decide the pending motion on the papers filed, and (3) in addition to the foregoing,
18 enter an order regarding the handling of the seized materials pending further order of this Court.

19 Respectfully Submitted,

20 FLYNN & STILLMAN

21 

22 Dated: May 3, 2006

23 By: _____

24 Philip H. Stillman, Esq.

25 Attorneys for DENNIS MONTGOMERY, BRENDA
26 MONTGOMERY and MONTGOMERY FAMILY TRUST
27
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CERTIFICATE OF SERVICE

I, Philip H. Stillman, declare: I am an employee in the Town of Cardiff, County of San Diego, State of California, employed by the Law Office of Flynn & Stillman, located at 224 Birmingham Drive, Suite 1A4, Cardiff, CA 92007. I am over the age of 18 years and not a party to this action.

I am readily familiar with the Law Office of Flynn & Stillman's practice for the collection of mail, delivery of its hand-deliveries, their process of facsimile's and the practice of mailing.

On 3rd day of May, 2006, I caused the foregoing document to be delivered to the following persons and/or entities:

Paul Pugliese, AUSA
United States Attorney's Office for the District of Nevada
100 W. Liberty Street
Reno, NV 89501

BY FACSIMILE AND BY EMAIL.

/S/PHS
Philip H. Stillman
Flynn & Stillman